612.

# SUPREME COURT OF THE UNITED STATES.

## No. 149.

WILLIAM McDONALD, PLAINTIFF IN ERROR,

vs.

MATTHEW HOBSON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR OHIO.

INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of summons | 1 | 2 |
| Marshal's return | 2 | 3 |
| Declaration | 2 | 3 |
| Demurrer of defendant | 8 | 6 |
| Demurrer overruled, and defendant ruled to plead | 10 | 7 |
| Pleas of defendant | 10 | 7 |
| Replication to defendant's pleas | 14 | 10 |
| Judgment | 15 | 10 |
| Clerk's certificate | 16 | 11 |
| Assignment of errors | 16 | 11 |
| Writ of error | 18 | 11 |
| Citation | 19 | 12 |
| Service of citation waived | 20 | 13 |


J. & G. S. Gideon, printers.

Pleas begun and held at the court-house, in the city of Cincinnati, on the first Monday in the month of July, being the first day of the same month, in the year of our Lord one thousand eight hundred and forty-four, and in the sixty-eighth year of the independence of the United States of America, before the honorable John McLean and Humphrey H. Leavitt, judges of the seventh circuit court of the United States, within and for the district of Ohio. Among other proceedings had were the following to, wit:

MATTHEW HOBSON, plff.,
vs.
WILLIAM MCDONALD, administrator of Duncan McArthur, deceased, deft. } Covenant.

Be it remembered, that heretofore, to wit, on the fifteenth day of July, being at the July term of said court, in the year of our Lord one thousand eight hundred and forty-three, came the said plaintiff, by Messrs. Stanbery and Bond, his attorneys, and sued out of the clerk's office of said court a certain writ of summons ad respondendum, against the said defendant, in the words and figures following, to wit:

"*The United States of America, district of Ohio, ss:*

To the marshal of said district, greeting:

You are hereby commanded to summon William McDonald, a citizen and resident of the State of Ohio, administrator of Duncan McArthur, late a citizen, &c., of the State aforesaid, to be and appear before our judges of our circuit court at Cincinnati, in said district, forthwith to answer Matthew Hobson, a citizen of, and resident in, the State of Alabama, in a plea of covenant, to his damage ten thousand dollars, and of this writ make legal service and due return, and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the United States, this fifteenth day of July, in the year of our Lord one [SEAL.] thousand eight hundred and forty-three, and of the independence of the United States the sixty-eighth.

Attest, WM. MINER, *Clerk.*"

(Endorsement.) "Suit brought on a contract under seal, made by said Duncan McArthur, with the plaintiff, dated September 25, 1830, and to recover the sum of $3,201 00, and interest thereon, from said 25th Sept., 1830, under the covenant contained in said contract, by which said Duncan McArthur agrees to pay the said plaintiff any excess beyond the sum of $11,500, which said plaintiff might be found entitled to demand from said Duncan, upon the determination of a certain case in chancery therein mentioned.

WM. KEY BOND,
And H. STANBERY,
*Atty's for plaintiff, and security for costs.*"

And afterwards, in this same term of July, came the marshal, to whom said writ was in form aforesaid directed, and returned the same into court here, endorsed as follows, to wit:

"Served by handing the within named defendant a true copy of this writ.

July 18, 1843. JOHN McELVAIN, *Marshal.*
By J. L. McELVAIN, *Deputy.*"

And afterwards, to wit, on the twenty-fourth day of July, in the year and at the term of the court last aforesaid, came again the said plaintiff, by his attorneys, and filed in court here his declaration herein, which is in the words and figures following, to wit:

"Circuit court of the U. S., for the seventh circuit and district of Ohio, July term, A. D. 1843:

*The United States of America, ss., district of Ohio:*

William McDonald, administrator of all and singular the goods, &c., of Duncan McArthur, deceased, (which said William is, and the said Duncan was, at the time of his death, a citizen and resident of the State of Ohio,) was summoned to answer unto Matthew Hobson, a citizen and resident of the State of Alabama, in the said United States of America, of a plea of covenant, broken; and thereupon the said Matthew, by Wm. Key Bond and H. Stanbery, his attorneys, complains: for that whereas, heretofore, to wit, on the 25th day of September, A. D. eighteen hundred and thirty, at Chillicothe, in the said district of Ohio, by a certain article of agreement, made and executed, as well by the said Matthew as by the said Duncan, and sealed with their seals respectively, which said article being on file in this court, as an exhibit in the case in chancery hereinafter mentioned, the said plaintiff is unable to make profert thereof, it was, among other things, witnessed: That whereas, on the 10th day of November, in the year of our Lord eighteen hundred and ten, a contract was entered into by and between John Hobson and Matthew Hobson, (the said plaintiff,) of the one part, and Duncan McArthur, (the said defendant's intestate,) of the other part, providing for the withdrawal of certain entries of land warrants, and the relocation of the same, as by reference to said contract will appear, since which time the said John Hobson had transferred his interest in said contract to the said Duncan McArthur; and whereas, on the 26th of May, 1830, the Congress of the United States passed and enacted a certain statute, in virtue of which it became competent for the parties to the said last mentioned contract, as holders and owners of the re-entries made under said last mentioned contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in said entries were valued by an inquest appointed by the United States, with interest, as by the said statute would appear. And whereas the said Matthew and Duncan were each willing to make such relinquishment to the United States, and avail themselves of the benefits of the said act of Congress, but had disagreed about their re-

spective rights under said last mentioned contract; in consequence of which said disagreement the said Duncan McArthur had then recently instituted a certain suit in chancery in the supreme court of the State of Ohio, in and for the county of Ross, in said State; and, among other things, had obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money under the said act of Congress, until the matters could be enquired into, as by reference to said suit would fully appear. And whereas, (as is further recited by said article of agreement first herein mentioned,) the said parties, to wit, the said Matthew and Duncan, were then mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as should await the determination of said suit, should not remain inactive, and did therefore wish to put the whole matter in such state as would make the fund available and profitable pending the same suit, but without in any manner affecting, or being held, or interpreted as affecting, their said controversy; in order to accomplish which it had then been determined and arranged, that the said Matthew should assign and transfer to the said Duncan all the interest of the said Matthew of, in, and unto the said entries and warrants in such way as would enable the said Duncan to receive from the United States the monies aforesaid, out of which said money the said Duncan should at once pay to the said Matthew the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan's, possession; and the said Duncan, in and by the said article of agreement first herein mentioned, did covenant, to and with the said Matthew, that if, in the said suit so instituted as aforesaid, it should be held, adjudged, decreed, or determined, that the said Matthew, his heirs or assigns, executors or administrators, were, or should be, entitled to any greater portion of said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then and in such case, he, the said Duncan, his heirs, executors, or administrators, should and would pay to the said Matthew, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess, from the day of the date of said article of agreement, which said covenant last aforesaid, it was provided by said article of agreement, should be held to embrace any judgment, order, or decree, which might produce the said result, whether made and rendered in said suit in chancery, or in any other suit, or before any other tribunal, founded on the same subject-matter or contract; and in and by said first mentioned article of agreement, it was further witnessed, that the said Matthew Hobson did thereby covenant to and with the said Duncan McArthur, that in case it should be determined, held, ordered, adjudged, or decreed in said chancery suit, or before any other tribunal finally decided in a suit founded on the same subject-matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, and administrators, should and would refund and pay to the said Dun-

can McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount so received by him beyond what he was entitled to, with interest thereon from the said date of said article of agreement.

The said plaintiff further says, that, in performance of his covenant in that behalf in said article of agreement mentioned, he did, afterwards, to wit, on the said twenty-fifth day of September, A. D. 1830, at Chillicothe aforesaid, assign and transfer to the said Duncan McArthur all the interest of him, the said Matthew, of, in, and unto the said entries and warrants; which said assignment and transfer was then and there accepted, and received by the said Duncan in discharge of the said covenant of the plaintiff in that behalf so made as aforesaid. In virtue of which said assignment and transfer, the said Duncan, afterwards, to wit, on the same day and year last aforesaid, at Chillicothe aforesaid, did receive from the United States the moneys so appropriated, amounting, in the whole, to a large sum of money, to wit, the sum of fifty-seven thousand six hundred and eight dollars.

And the said plaintiff further says, that such proceedings were afterwards had in the said suit in chancery, referred to in said before recited article of agreement, that afterwards, to wit, at the December term, A. D. 1831, of said circuit court for the seventh circuit and district of Ohio, the said suit in chancery was, on the petition of said Matthew Hobson, on the ground of his residence and citizenship in the State of Alabama aforesaid, removed to and docketed in the said circuit court; and such further proceedings were afterwards had in said suit, that the same was finally heard and decided before the Supreme Court of the United States at Washington, (to which said court the same had been taken by appeal from the decree of said circuit court,) at the January term thereof, A. D. 1842; and such decree was, by the said Supreme Court of the United States, then and there rendered, that it was adjudged and ordered, that the said Matthew Hobson should recover against the complainants in said suit, viz: Allen C. McArthur, James D. McArthur, Effie Coons, Mary Trimble, Eliza Anderson, Frances Walker, and John Kercheval, heirs at law of said Duncan McArthur, (he, the said Duncan, having deceased during the pendency of said suit, and the said last mentioned complainants having been made parties thereto in his place and stead,) the sum of one hundred and sixty-six dollars and eighty-three cents, for his costs therein expended, and that he have execution therefor; and further, that the said cause should be, and the same thereby was, remanded to the said circuit court, with directions to the said last mentioned court to dismiss the bill without prejudice.

And afterwards, to wit, at the July term, A. D. 1843, of the said circuit court, to which the mandate of the said Supreme Court had been duly sent for execution of the said last mentioned decree, the said bill was, by the order of said circuit court, in conformity with said mandate, dismissed without prejudice; all which will more fully and at large appear by reference to the record and proceedings of said suit in chancery, and the said mandate, and several orders and decrees therein, now in said court remaining.

And the said plaintiff further avers, and in fact says, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the said defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by the said Duncan McArthur as aforesaid, than the said sum of eleven thousand five hundred dollars, (which last mentioned sum the plaintiff admits he received from said Duncan at and after the execution of said article of agreement,) to wit, the sum of three thousand two hundred and one dollars, with interest thereon from the said 25th of September, A. D. 1830. Of all which premises the said defendant, afterwards, to wit, on the tenth day of July, A. D. 1843, at Cincinnati, in the district of Ohio aforesaid, had due notice; yet neither the said Duncan, whilst in life, nor the said defendant, as administrator as aforesaid, since the decease of said Duncan, has at any time, though thereto requested, paid to said plaintiff the said last mentioned sum of money, at the Bank of Chillicothe or elsewhere, or any part thereof, but the same to do have hitherto refused, and the same, with the accruing interest, still remains wholly due and unpaid. Wherefore the said plaintiff saith, that neither the said Duncan nor the said defendant, his administrator as aforesaid, hath kept the said covenant in that behalf, but the same is broken, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings suit, &c.

BOND & H. STANBERY,
*Atty's for pl'ff.*"

And, thereupon, this cause was continued.

And afterwards, to wit, at rules held in the clerk's office of said court, for the month of August, in the year last aforesaid, came the said plaintiff, by his attorneys, and entered a rule therein on the said defendant to plead by September rules, or default.

And afterwards, to wit, on the fourteenth day of August, in the year last aforesaid, came the said defendant, by S. Mason, esq., his attorney, and filed in the clerk's office aforesaid his demurrer to the declaration of the plaintiff, which is in the words following, to wit:

Circuit court of the United States for the 7th circuit and district of Ohio. July term, 1843.

WILLIAM MCDONALD, administrator of all and singular the goods and chattels, &c., of Duncan McArthur, deceased,
ads.
MATTHEW HOBSON.

And the said defendant, by S. Mason, his attorney, comes and defends the wrong and injury, when, &c., and says, that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the pl'ff to have or maintain his action aforesaid thereof against the defendant; and he, the defendant, is not bound by law to answer the same, and this he is ready to verify. Wherefore, by reason of the insufficiency of

the declaration, the defendant prays judgment, and that the pl'ff may be barred from having or maintaining his action aforesaid, &c.

And the defendant, according to the force of the statute in such case made and provided, states, and shows to the court the following causes of demurrer to the declaration; that is to say, that the pl'ff has not shown any cause of action against the def't, or against the said Duncan McArthur, before or since his death; and secondly, that the plaintiff has not averred, or otherwise shown, any breach of the covenant of the said Duncan McArthur. Thirdly, that the plaintiff has not stated or averred any matter or thing by which he has shown himself entitled to have or demand the said sum of three thousand two hundred and one dollars, with interest thereon, or any other or further sum than the said eleven thousand and five hundred dollars, admitted by the pl'ff to have been by him received of the said Duncan McArthur; and also that the declaration is, in other respects, uncertain, informal, and insufficient, &c.

S. MASON, *for def't.*

And afterwards, to wit, on the twenty-third day of December, being at the December term of said court, in the year last aforesaid, the parties, by their attorneys, appear, and this cause coming on to be heard on the demurrer to the plaintiff's declaration, and the arguments of counsel heard, and mature deliberation being thereupon had, the demurrer is overruled, and the defendant ruled to plead within ninety days from the rising of this court; and this cause is continued.

And afterwards, to wit, on the eighth day of April, in the year of our Lord eighteen hundred and forty-four, came the said defendant, by his attorney, and filed in the clerk's office aforesaid his plea herein, which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *district of Ohio, ss:*

Circuit court of the U. States for the 7th circuit and district of Ohio, December term, A. D. 1843.

WILLIAM McDONALD, administrator of all the goods, &c., of Duncan McArthur, dec'd, ads. MATTHEW HOBSON.

And the said defendant, by S. Mason, his attorney, comes and defends the wrong and injury, when, &c., and craves oyer of the said supposed article of agreement in the said declaration mentioned, and it is read to him in these words: "Whereas, on the tenth day of November, in the year of our Lord eighteen hundred and ten, a contract was entered into by and between John and Matthew Hobson, of the one part, and Duncan McArthur, of the other part, providing for the withdrawal of certain entries of land warrants and the re-location of the same, as by reference to said contract will appear; since which time the said John Hobson has transferred his interest in the said contract to the said Duncan McArthur. And, whereas, the 26th May, eighteen

hundred and thirty, the Congress of the United States passed and enacted a certain statute, in virtue of which it is competent for the parties to the aforesaid contract, as holders and owners of the re-entries made under said contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in such entries were valued by an inquest appointed by the United States, with interest, as per the statute will appear.

And whereas the said Duncan McArthur and Matthew Hobson are each willing to make such relinquishment to the United States, and to avail themselves of the benefits of the said act of Congress, but have disagreed about their respective rights under the said contract, first herein referred to. In consequence of which disagreement, the said Duncan McArthur has recently instituted a certain suit in chancery in the supreme court of the State of Ohio, in and for Ross county; and, among other things, obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money, under the said act of Congress, until the matters can be enquired into, as by reference to said suit will fully appear. And whereas the said parties are mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as would await the determination of the controversy aforesaid, should not remain inactive; and, therefore, wish to put the whole matter in such state as will make the fund available and profitable pending their said controversy, but without, in any way or manner, affecting, or being held or interpreted as affecting, their said controversy. In order to accomplish which, it has been determined and arranged that the said Matthew Hobson shall assign and transfer to the said Duncan McArthur all the interest of the said Matthew Hobson of, in, and unto the said entries and warrants, in such way as will enable the said Duncan McArthur to receive from the United States the moneys aforesaid; out of which said money the said Duncan McArthur shall at once pay to the said Matthew Hobson the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan McArthur's, possession. And the said Duncan McArthur hereby covenants, to and with the said Matthew Hobson, that if, in the said suit, so instituted as aforesaid, it shall be held, adjudged, decreed, or determined, that the said Matthew Hobson, his heirs or assigns, executors or administrators, was, is, or are, were, or shall be, entitled to any greater portion of the said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then, and in such case, he, the said Duncan McArthur, his heirs, executors, or administrators, shall and will pay to the said Matthew Hobson, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess from this day; and the last mentioned covenant shall be held as embracing any judgment, order, or decree, which may produce the result before mentioned, whether made and rendered in the suit aforesaid, or in any other suit, or before any other tribunal, founded on the same subject matter or contract; and the said Matthew

Hobson does hereby covenant, to and with the said Duncan McArthur, that, in case it shall be determined, held, ordered, adjudged, or decreed, in the said suit, or before any other tribunal finally decided, in a suit founded on the same subject matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, or administrators, shall and will refund and pay to the said Duncan McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount, so received by him, beyond what he was or is entitled to, with interest thereon from this day. The said parties mutually agree and covenant that this contract and arrangement shall not be used by either of them, nor at any time held or interpreted in the suit aforesaid, or in any other suit, or in any other court, or in any proceedings, whether in court or out of court, under the aforesaid contract, as affecting, changing, or in any wise disturbing the rights of either in the matters aforesaid; but the suit aforesaid shall be conducted, and any other suit which either of them may think proper to bring, founded on the contract aforesaid, may and shall be conducted in all respects as though this contract had not been entered into.

In testimony whereof, we, the said Matthew Hobson and Duncan McArthur, the parties to the foregoing contract, have hereunto *have hereunto* set their hands and seals, the 25th day of September, 1830.

MATTHEW HOBSON, [SEAL.]
DUNCAN McARTHUR. [SEAL.]

Signed, sealed, and delivered in presence of—
WM. KEY BOND,
J. L. TAYLOR."

Which being read and heard, the said defendant says, that the said supposed article of agreement is not the deed of the said Duncan McArthur, and of this he puts himself upon the country, &c. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, as such administrator as aforesaid, because he says that there is not any record of the said supposed decree, in the said declaration mentioned, remaining in the said circuit court, in manner and form as the plaintiff has above, in his declaration, alleged; and this the said defendant is ready to verify by the record; wherefore, he prays judgment if the said plaintiff ought to have or maintain his said action thereof against the defendant, as such administrator as aforesaid, &c.

S. MASON,
*Attorney for defendants*."

And afterwards, to wit, on the twenty-ninth day of June, in the year of our Lord eighteen hundred and forty-four, came the plaintiff by his attorneys, and filed, in the clerk's office aforesaid, his replig and

hundred and thirty, the Congress of the United States passed and enacted a certain statute, in virtue of which it is competent for the parties to the aforesaid contract, as holders and owners of the re-entries made under said contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in such entries were valued by an inquest appointed by the United States, with interest, as per the statute will appear.

And whereas the said Duncan McArthur and Matthew Hobson are each willing to make such relinquishment to the United States, and to avail themselves of the benefits of the said act of Congress, but have disagreed about their respective rights under the said contract, first herein referred to. In consequence of which disagreement, the said Duncan McArthur has recently instituted a certain suit in chancery in the supreme court of the State of Ohio, in and for Ross county; and, among other things, obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money, under the said act of Congress, until the matters can be enquired into, as by reference to said suit will fully appear. And whereas the said parties are mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as would await the determination of the controversy aforesaid, should not remain inactive; and, therefore, wish to put the whole matter in such state as will make the fund available and profitable pending their said controversy, but without, in any way or manner, affecting, or being held or interpreted as affecting, their said controversy. In order to accomplish which, it has been determined and arranged that the said Matthew Hobson shall assign and transfer to the said Duncan McArthur all the interest of the said Matthew Hobson of, in, and unto the said entries and warrants, in such way as will enable the said Duncan McArthur to receive from the United States the moneys aforesaid; out of which said money the said Duncan McArthur shall at once pay to the said Matthew Hobson the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan McArthur's, possession. And the said Duncan McArthur hereby covenants, to and with the said Matthew Hobson, that if, in the said suit, so instituted as aforesaid, it shall be held, adjudged, decreed, or determined, that the said Matthew Hobson, his heirs or assigns, executors or administrators, was, is, or are, were, or shall be, entitled to any greater portion of the said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then, and in such case, he, the said Duncan McArthur, his heirs, executors, or administrators, shall and will pay to the said Matthew Hobson, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess from this day; and the last mentioned covenant shall be held as embracing any judgment, order, or decree, which may produce the result before mentioned, whether made and rendered in the suit aforesaid, or in any other suit, or before any other tribunal, founded on the same subject matter or contract; and the said Matthew

Hobson does hereby covenant, to and with the said Duncan McArthur, that, in case it shall be determined, held, ordered, adjudged, or decreed, in the said suit, or before any other tribunal finally decided, in a suit founded on the same subject matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, or administrators, shall and will refund and pay to the said Duncan McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount, so received by him, beyond what he was or is entitled to, with interest thereon from this day. The said parties mutually agree and covenant that this contract and arrangement shall not be used by either of them, nor at any time held or interpreted in the suit aforesaid, or in any other suit, or in any other court, or in any proceedings, whether in court or out of court, under the aforesaid contract, as affecting, changing, or in any wise disturbing the rights of either in the matters aforesaid; but the suit aforesaid shall be conducted, and any other suit which either of them may think proper to bring, founded on the contract aforesaid, may and shall be conducted in all respects as though this contract had not been entered into.

In testimony whereof, we, the said Matthew Hobson and Duncan McArthur, the parties to the foregoing contract, have hereunto *have hereunto* set their hands and seals, the 25th day of September, 1830.

MATTHEW HOBSON, [SEAL.]
DUNCAN McARTHUR. [SEAL.]

Signed, sealed, and delivered in presence of—
WM. KEY BOND,
J. L. TAYLOR."

Which being read and heard, the said defendant says, that the said supposed article of agreement is not the deed of the said Duncan McArthur, and of this he puts himself upon the country, &c. And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, as such administrator as aforesaid, because he says that there is not any record of the said supposed decree, in the said declaration mentioned, remaining in the said circuit court, in manner and form as the plaintiff has above, in his declaration, alleged; and this the said defendant is ready to verify by the record; wherefore, he prays judgment if the said plaintiff ought to have or maintain his said action thereof against the defendant, as such administrator as aforesaid, &c.

S. MASON,
*Attorney for defendants*."

And afterwards, to wit, on the twenty-ninth day of June, in the year of our Lord eighteen hundred and forty-four, came the plaintiff, by his attorneys, and filed, in the clerk's office aforesaid, his replica-

tion to the said pleas of the said defendant, which is in the words and figures following, to wit:

"Circuit court of the United States, for the 7th circuit and district of Ohio, of December term, A. D. 1843.

MATTHEW HOBSON,
vs.
WILLIAM MCDONALD, adm'r, &c., of Duncan McArthur.

And now comes the said plaintiff; and as to the said plea of the said defendant, by him first above pleaded, and whereof he hath put himself upon the country, doth the like. And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded, saith, that he, the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him, the said defendant, because he saith that there is such a record of the said decree remaining in the said circuit court as he, the said plaintiff, hath above, in his said declaration in that behalf alleged; and this he, the said plaintiff, is ready to verify by the said record, when, where, and in such manner, as the court here shall direct and award; and he prays that the said record may be inspected and seen by the court here, &c.

BOND & STANBERRY,
*Attorneys for plaintiff*."

And now at this day, to wit, the time and at the place first herein aforesaid mentioned, comes as well the said plaintiff, by Messrs. Bond & Stanberry, his attorneys, as the said defendant, by Mr. Mason, his attorney, and submit to the court here the trial of the issues joined, as well upon the plea of non est factum, as upon the plea of nul tiel record; and, thereupon, this case is argued before his honor, the said Humphrey H. Leavitt, in the absence of the circuit judge; and the proofs and allegations of the parties having been heard, the court take time to advise in the premises. And now, to wit, on this 26th day of July, in our said term of July, A. D. 1844, the court, being fully advised in the premises, do find that there is such a record of the said decree remaining in our said court as the said plaintiff hath above, in his said declaration in that behalf, alleged; and do further find that the said article of agreement, in said declaration mentioned, and recited in the said plea of the said defendant first above pleaded, is the deed of the said Duncan McArthur; and thereupon, neither party requiring a jury, but submitting the assessment of the damages to the court, and the court, being fully advised therein, do assess the damages of the said plaintiff in the premises at the sum of five thousand eight hundred and thirty-three dollars and thirty cents. Whereupon, it is considered by the court here that the said plaintiff recover against the said defendant or administrator as aforesaid the said sum of five thousand eight hundred and thirty-three dollars and thirty cents, for his damages aforesaid in form aforesaid assessed; and also his costs in this behalf

expended, taxed to $28 69. The said damages and costs to be levied of the goods and chattels which were of the said Duncan McArthur at the time of his death, and in the hands of the said William McDonald, as administrator as aforesaid, yet to be administered.

*The United States of America, district of Ohio, ss:*

I, William Miner, clerk of the circuit court of the United States within and for the seventh circuit and district of Ohio, do hereby certify, that the foregoing is truly taken and copied from the records of the proceedings of said court.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said circuit court, this 10th day of July, [L. S.] anno domini 1845, and in the 70th year of the independence of the United States of America.

Attest: WM. MINER, *Clerk*.

Fees for this transcript, $8 50.

And the said William McDonald, administrator as aforesaid, now comes and says, that, in the record and proceedings aforesaid, there is error in this, to wit:

1st. That the declaration aforesaid, and the matters therein contained, are not sufficient in law to maintain the said action.

2d. That said judgment was given in favor of the said plaintiff, when, by the laws of the land, it ought to have been given for the defendant.

3d. It does not appear, from the record, that there was any cause of action in favor of the said plaintiff against the said defendant, at the commencement of this suit; but, on the contrary, it does appear, from the record, that there was no cause of action.

Wherefore, the said defendant prays that a citation and writ of error may issue, and that the said judgment may be reversed, and that he may be restored to all things which he has lost by reason thereof.

WILLIAM McDONALD,
*Adm'r of D. McArthur, deceased.*
By S. MASON, and
J. H. THOMPSON,
*His attorneys.*

*July 10th*, 1845.

The United States of America, to the honorable the judges of the circuit court of the United States for the seventh circuit and district of Ohio, greeting:

Whereas, in the record and process, and also in the rendering judgment in a certain action of covenant, which was in said court, between Matthew Hobson, plaintiff, and William McDonald, administrator of Duncan McArthur, dec'd, defendant, manifest error hath intervened as it is said to the great damage of the said William McDonald, administrator as aforesaid, as by his complaint we are informed; and we being willing that the error aforesaid, (if any,) be corrected, and full and

speedy justice be done in this behalf to the said parties, command you that the record, process, and judgment aforesaid, with all things touching the same, under your seals, distinctly and plainly, without delay, you send and certify to the judges of the Supreme Court of the United States, on the first day of the next term of said court; so that the judgment aforesaid being inspected, the court may further, for correcting the error aforesaid, do that which of right and according to law ought to be done.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 22d day of November, in the year of
[SEAL.] our Lord one thousand eight hundred and forty-five, and in the 70th year of the American independence.

Attest: WM. MINER, *Clerk*.

Allowed: JOHN McLEAN,
*Justice Supreme Court U. States, 7th circuit.*

Carey Tremble and Wm. Anderson, security on the writ of error; penalty $500.

Bond and security given, and filed in my office.

Attest: WM. MINER, *Clerk*.

The United States of America, Supreme Court of the United States, to Matthew Hobson, greeting:

Whereas, William McDonald, administrator of Duncan McArthur, deceased, has obtained the allowance of our writ of error to the circuit court of the United States for the seventh circuit and district of Ohio, directed to remove into the said Supreme Court, to be holden at the city of Washington, on the first Monday in the month of December next, the record of a certain plaint, process, proceedings and judgment, in an action of covenant, wherein you, the said Matthew Hobson, in that action lately recovered against the said Wm. McDonald, administrator of Duncan McArthur, deceased, the sum of five thousand eight hundred and thirty-three dollars and thirty cents damages and costs, as by the said record, in the said circuit and district aforesaid remaining, appears; in which said record and proceedings, and also in the rendition of the judgment thereupon, manifest error hath intervened, as by the said William McDonald, administrator as aforesaid, we are informed, and our said writ of error granted, issued and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be. You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the first Monday in the month of December next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Roger B. Taney, chief justice of the United States of America, this 22d day of November, in the year of
[SEAL.] Lord one thousand eight hundred and forty-five, and in the 70th year of the American independence.

Attest: JOHN McLEAN,
*Justice Sup. Court U. States, 7th circuit.*

*McDonald* vs. *Hobson*. 61 ~~13~~

*Lancaster*, O., *Dec.* 8, 1845.

My dear sir:—Your favor of the 2nd inst. is received.

I hereby waive service of notice of pendency of the writ of error in Supreme Court, U. S., prosecuted by Wm. McDonald, administrator of Duncan McArthur vs. Matthew Hobson, and authorize you to enter my appearance as atty. for defendant in error.

I do this, however, with the reservation that if I do not find it convenient to attend the present session of the Sup. Court, the case will be continued until the next term.

Very respectfully, yours,

HENRY STANBERY.

Hon. Saml. F. Vinton.

Filed 16th Dec., 1845.